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No. 08-1395

Supreme Court, U.S.
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In The

Supreme Court of the United States

LEN WALLACE, et al.,

Petitioners,

v.

STATE OF MONTANA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Montana Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEVE BULLOCK
Attorney General of Montana
CHRIS D. TWEETEN
Chief Civil Counsel
Counsel of Record
STATE OF MONTANA
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

For purposes of the brief in opposition to the Petition, Respondents accept that Petitioners seek review of the questions stated in the Petition.

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JURISDICTION

This case[1] does not "draw into question the validity of a state statute on the ground that it is repugnant to the Constitution and laws of the United States." Pet. 1. The Montana Supreme Court found that the statutory changes enacted in Initiative 143 (hereafter generally "I-143"), codified at Mont. Code Ann. §§ 87-4-407(1), 87-4-408(1), 87-4-411, 87-7-412(2), 87-4-413, 87-4-414(2), 87-4-428, 87-4-433, R. App. 1-7,[2] were business regulations validly adopted under the police power of the State of Montana. Petitioners do not challenge that holding here.

In the courts below, Petitioners sought just compensation on the theory that the enactment of these statutes caused an uncompensated taking in violation of the Fifth Amendment. This claim assumes the validity of the statutes. *See Lingle v. Chevron U.S.A.*, 544 U.S. 528, 544 (2005) ("[T]he Takings Clause

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[1] The Petition seeks review of judgments in two cases tried separately before different judges. Petitioners Len and Pamela Wallace were plaintiffs in the case reported as *Buhmann et al. v. Montana*, 348 Mont. 205, 201 P.3d 70 (2008). For clarity, this case will be referred to herein as "*Buhmann/Wallace*." The case involving the Kafkas and Bridgewaters, *Kafka v. Montana Department of Fish, Wildlife & Parks*, 348 Mont. 80, 201 P.3d 8 (2008) will be abbreviated "*Kafka*."

[2] The appendix accompanying the Petition will be abbreviated "P. App." The appendix submitted by Respondents will be abbreviated "R. App." Citations to the trial court's findings of fact are abbreviated "FF." Citations to the Conclusions of Law are abbreviated "CL."

presupposes that the Government has acted in pursuit of a valid public purpose."). The claim falls within the Court's jurisdiction under 28 U.S.C. § 1257(a) because it asserts a privilege arising under the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

This case involves the application of the statutes enacted by I-143, which are codified at Mont. Code Ann. §§ 87-4-407(1), 87-4-408(1), 87-4-411, 87-7-412(2), 87-4-413, 87-4-414(2), 87-4-415, 87-4-416, 87-4-417, 87-4-428, 87-4-433. These statutes are set forth verbatim at R. App. 1-7. It involves the following administrative rules of the State, which are also set forth in R. App. 8-20: Admin. R. Mont. 12.6.1522, 12.6.1525, 12.6.1533, 12.6.1538 (part), 12.6.1539 (part), 12.6.1542 (part), 32.4.201 (part), 32.4.301 (part), 32.4.401 (part), 32.4.502 (part), 32.4.1302 (part) (hereafter cited as "ARM").

STATEMENT OF THE CASE

Since 1917, Montana has allowed ownership of wild game species, including deer and elk, under tightly regulated conditions. P. App. 306. *Cf. Rosenfeld v. Jakways*, 67 Mont. 558, 562-63, 216 P. 776, 777 (1923) (private ownership and commercial use of wild game species permissible only with specific legislative approval). In 2000, the State enacted I-143, which

changed the State's regulations by, among other things, prohibiting game farms, also known as "alternative livestock ranches," from selling an act known as "fee-shooting" – the collection of a fee in exchange for the right to shoot a captive elk or deer.

A. Pertinent Facts

The facts set forth in the succeeding paragraphs are not presented here to establish, in violation of the Court's holding in *Lingle*, that Montana's interests in enacting I-143 were substantial. They are pertinent to this case because they "help[ ] to shape the reasonableness of [Petitioners'] expectations." *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J. concurring); *cf.* P. App. 54, 57 (Montana Supreme Court recognizes that *Lingle* forecloses consideration of the substantiality of the State's interests).

Initiative 143 added a layer to the State's already extensive regulation of game farms. The State requires completion of a comprehensive application describing the proposed game farm. ARM 12.6.1522, R. App. 8-10. The State strictly controls transactions for the transfer of animals from game farm to game farm. Mont. Code Ann. § 87-4-416, R. App. 6, ARM 12.6.1539(1), 32.4.201(1), 32.4.301(1), 32.4.401(1), R. App. 14-18. The State requires game farmers to keep accurate records identifying every game farm animal on every game farm, and tracking each animal's status until it dies or the game farmer sells or

otherwise disposes of it. Mont. Code Ann. §§ 87-4-415, 87-4-417, R. App. 4-7, ARM 12.6.1539, R. App. 14-15.

Montana requires the confinement of game farm animals behind fences meeting standards set by state regulation. ARM 12.6.1533, R. App. 12-14. The State regulates fences to keep game farm animals inside the enclosures and to prevent wild animals from entering. ARM 12.6.1533, 12.6.1538, R. App. 12-13. The strict fencing requirements assist in monitoring disease and in preventing interbreeding between game farm animals and wild animal populations. Game farm animals have been bred for certain genetic characteristics that are undesirable in the wild population, which include hybrid genes developed through the cross-breeding of elk with deer. ARM 12.6.1542, R. App. 16, P. App. 310, FF 49.

The State also regulates game farms to monitor and control diseases. In addition to the fencing requirements, the State requires game farmers to vaccinate their animals against diseases. Officials from the State Department of Livestock regularly inspect the game farms to enforce this requirement and to test live game farm animals for communicable disease. ARM 32.4.301, R. App. 17.

Although testing cannot control a disease outbreak, P. App. 309, FF 46, the State takes special steps to monitor the spread of an especially devastating disease known as Chronic Wasting Disease or "CWD." ARM 32.4.502, 32.4.1302, R. App. 18-20. CWD is "a poorly understood disease in the same

family as . . . Mad Cow Disease." P. App. 309, FF 47. A previous outbreak of CWD at a Montana game farm resulted in the slaughter of every animal on the game farm. Of more concern, an outbreak of CWD in the wild would require the slaughter of every wild deer and elk found in the area surrounding the outbreak. P. App. 309-10, FF 48. There is no test for the presence of CWD in live animals. CWD in deer and elk can only be detected by post-mortem examination of brain tissue from the dead animal. The State requires such examination on game farm animals after death. ARM 32.4.1302(3), R. App. 19-20.

Before a game farm license can be issued, the State requires an environmental review, which produces a decision document for each license application. ARM 12.6.1525, R. App. 10-11. In the case of Petitioners' licenses, the decision documents showed that game farms were controversial in Montana. P. App. 300, FF 12; *id.*, 339-42, FF 7-12. The licenses themselves were valid only as long as Petitioners complied with state regulations as they might change from time to time. P. App. 306, FF 35; *id.*, FF 14, 15.

Petitioners well-knew that game farms were highly regulated and speculative investments. For example, the Kafkas' banker initially refused to finance their game farm operation because of uncertainty about its ability to survive. P. App. 346, FF 20, 21. Despite this, the Kafkas "adopted a very aggressive business plan [that] put the entire agricultural operation at risk." They continued to develop this business plan after Kim Kafka became aware that

I-143 was on the ballot and that, if it passed, it would abolish fee-shooting and "make it impossible for him . . . to cash flow his operation." P. App. 348, FF 26, P. App. 363, CL 68; *see also* P. App. 307, FF 40, 41 (When the Wallaces began their game farm they were aware that the industry was highly regulated and that the State could impose new limits on their operations).

The passage of I-143 ended fee-shooting of game farm animals. It did not confiscate the animals, nor did it prevent their sale in other markets. These included the elk venison market and shipment to fee-shooting operations on game farms outside the state of Montana. P. App. 302-03, FF 18-21; *id.* 349, FF 28.

B. Proceedings Below

Both the *Buhmann/Wallace* and *Kafka* cases were decided following non-jury trials. Based on the evidence described above, both courts found that the enactment of I-143 did not cause a taking of Petitioners' property for Fifth Amendment purposes. Both courts acknowledged that I-143 had significantly affected Petitioners' businesses and the value of their game farm animals. Both also concluded that on the specific facts presented, the highly regulated and speculative nature of game farms prevented Petitioners from entertaining reasonable investment-backed expectations in the game farm businesses. P. App. 325, CL 27 (*Buhmann/Wallace*); P. App. 384, CL 34 (*Kafka*).

On appeal, the Montana Supreme Court issued separate opinions affirming the lower courts' decisions, with the *Kafka* decision as the lead opinion. The court left intact all of the factual findings set forth above regarding the regulatory climate surrounding game farms and the failure of Petitioners to show that their investment-backed expectations were reasonable. The court also rejected Petitioners' claim that the intangible interests in the goodwill and going concern value of their businesses were separately compensable property interests. P. App. 157-65. Petitioners do not challenge that holding here.

Turning to the application of the balancing test adopted by this Court in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), the court first found that I-143 did not cause a regulatory taking of Petitioners' real property, which had lost no value and in fact had increased in some ways. P. App. 174-76. With respect to Petitioners' game farm animals, the court held that the trial court had understated the economic impact of I-143 on the value of Petitioners' game farm animals, which the court found to be substantial enough to weigh in favor of a taking. P. App. 176.

The court considered the "character of the governmental action" prong to weigh against a taking, because I-143 did not seize Petitioners' animals nor did it prohibit them from making other uses of those animals including sale to out-of-state markets or shooting without charging a fee. The court placed heavy reliance, however, on Petitioners' complete

failure to demonstrate an investment-backed expectation in their game farms that was objectively reasonable, based largely on the factual findings detailed above. P. App. 58-63, 179-83.

The court's opinion in *Buhmann/Wallace* largely followed the analysis provided in *Kafka*, with one significant additional holding. The court rejected Petitioners' claim that I-143 caused a "categorical taking," *see Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), with respect to personal property. P. App. 47-51. Petitioners do not challenge that holding here.

SUMMARY OF ARGUMENT

1. The questions presented in the Petition fall into three categories: those that are not presented by the case at all, those that are abstract academic arguments that do not affect the outcome of the case, and those that are insubstantial. Question 1 is built on the premise that the court below held, as a matter of law, that a business operator could never assert a reasonable investment-backed expectation with respect to a highly regulated business. The Montana Supreme Court's opinion contains no such holding and, in fact, expressly contradicts Petitioners' premise. Question 2 is likewise based on the erroneous claim that the Montana court considered the fit between the effect of I-143 and its objective in violation of *Lingle*.

Questions 2 and 3 raise vague inquiries regarding the *Penn Central* "character of governmental action" factor. These abstract questions can be answered in ways that would not affect the outcome of this case. At the end of the day, the factors identified in *Penn Central* are neither exclusive nor exhaustive of the matters that can be considered in the "ad hoc, factual inquiries," *Penn Central*, 438 U.S. at 124, that determine whether a taking has occurred. The court below carefully weighed the facts in finding that a taking had not occurred. Petitioners' academic quibbles do not present questions worthy of this Court's consideration.

Question 4, asserting that I-143 causes a taking by regulating the price of fee-shooting down to zero, is not presented here because, as the courts below found, I-143 did not regulate the price of fee-shooting but banned the practice entirely. The cases on which petitioners rely for their price control argument are of no assistance here because they involve special taking rules, not applicable here, governing valuation of the property of public utilities. *See, e.g., Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989) ("This partly public, partly private status of utility property creates its own set of questions under the takings clause of the Fifth Amendment.").

2. The decisions below do not conflict with the law of the Federal Circuit. The Federal Circuit's cases are uniform in holding that a claimant holds no reasonable investment-backed expectations when the claimant does not, as a factual matter, reasonably

believe that future government actions will not affect the profitability of the business going forward. The Federal Circuit distinguishes the case on which Petitioners principally rely, *Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1990), because in that case the trial court specifically found that the claimants could not reasonably have expected that the government regulation would substantially impair the value of their investment. The decisions below are consistent with the holding in these cases.

3. The Montana Supreme Court's analysis of Petitioners' taking claim is consistent with this Court's precedents. No decision of this Court has found a taking where the claimant understood that its business might predictably be ended by a change in government policy adopted through a regulation aimed at protecting public health, safety and welfare. To the contrary, this Court has recognized that under such circumstances the government may substantially devalue, or even render worthless, the inventory or other property of the business without having to pay compensation under the Takings Clause. *See, e.g., Andrus v. Allard*, 444 U.S. 51 (1979) (regulating sale of eagle feathers). Petitioners have presented no arguments distinguishing or calling for re-examination of these decisions.

ARGUMENT

I. This Case Does Not Present An Important Federal Question.

The Montana Supreme Court held in these cases that the enactment of I-143 did not cause an uncompensated taking of Petitioners' game farms and their business interests in them. Petitioners do not seek this Court's intervention to decide matters on which the Montana court's decision rests. Rather, two of their questions (Questions 1 and 2) challenge holdings that the Montana Supreme Court did not make. Two questions (Questions 2 and 3) pose abstract philosophical questions about this Court's taking jurisprudence, the answers to which would not necessarily change the outcome here. Question 4 accuses the Montana Supreme Court of refusing to follow a rule that no federal court has ever adopted.

With respect to state court judgments, this Court's certiorari power exists to allow the Court to decide "an important question of federal law that has not been, but should be, settled by this Court," Sup. Ct. R. 10(c); *see Rice v. Sioux City Mem. Park Cemetery*, 349 U.S. 70, 74 (1955) (order dismissing writ as improvidently granted) ("A federal question . . . may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues."). And, since the Court reviews judgments and not simply issues, the federal question argued in a petition must

deal with matters central to the validity of the state court's judgment. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.") (citation omitted). The Court should deny this petition because it fails to meet these requirements.

A. Issues 1 and 2 falsely characterize the bases for the Montana court's decision.

Petitioners urge this Court to grant the Petition to allow them to argue "that presence in a highly regulated industry does not preclude reasonable investment-backed expectations as a matter of law." Pet. 25. They cite *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), as an example of a case in which the Court recognized reasonable investment-backed expectations in a highly regulated industry.

Petitioners mischaracterize the Montana court's holding. The Montana Supreme Court reached the same conclusion as Petitioners – that reasonable investment-backed expectations ***can*** exist in highly regulated industries – and cited *Ruckelshaus* as its authority as well.

In *Kafka*, the Montana court considered the claim that I-143 took the Kafka Petitioners' game farm elk, methodically evaluating the three *Penn Central* factors. When the court got to the issue of

reasonable investment-backed expectations, the court stated:

> ***While one can maintain reasonable investment-backed expectations in highly-regulated industries, e.g., Ruckelshaus [v. Monsanto], 467 U.S. at 1010-11 . . . (finding reasonable investment-backed expectations in the pesticide industry)*** . . . we agree with the view . . . that the regulated and speculative nature of a particular industry ***should be considered*** in determining whether investment-backed expectations are reasonable.

P. App. 179-80 (emphasis added). *See Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) ("[T]he regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of [the claimant's] expectations.").

The court then analyzed the specific facts of the case showing that Petitioners' expectation of a perpetually profitable fee-shooting business was not reasonable, including the State's extensive regulation of the industry, the notation on the licenses reinforcing that a game farmer's right to operate was conditioned on compliance with the rules adopted by the State, the well-known controversy surrounding game farms, game farms' role in the spread of CWD, and the unethical nature of fee-shooting.

The *Kafka* trial court found as fact that Kim Kafka was aware of these factors and knew when he

pursued his aggressive business plan that I-143, if enacted, would destroy his fee-shooting operation. P. App. 346-48, FF 22-28. The Montana Supreme Court accepted these factual findings and relied on them to hold:

> [Petitioners] should have reasonably anticipated . . . that the State might make the regulatory burden of participating in this field so onerous that Game Farms would no longer be profitable enterprises. In other words, appellants could not maintain a reasonable investment-backed expectation that they would be permanently insulated against the possibility that the Game Farm industry would be . . . regulated so as to eliminate its profitability. . . .

P. App. 183; *see also id.* at 58 (*Buhmann/Wallace*) ("[W]e conclude that appellants ***in this case*** could not maintain a reasonable investment-backed expectation that Game Farms, and by extension fee-shooting, would always be legal in Montana." (Emphasis added.)).

Likewise, with respect to issue 2, Petitioners argue that in the wake of this Court's decision in *Lingle*, the "character of the government action" prong of the *Penn Central* test should not include an inquiry into the fit between the regulation and its objective. Pet. 27. The Montana Supreme Court agreed. P. App. 54, 57.

The Court need not grant this Petition to review conclusions on which the Petitioners and the

Montana courts agree. Questions 1 and 2 state no grounds for granting the Petition.

B. Questions 2 and 3 present abstract questions, the answers to which do not call into question the soundness of the Montana court's decision.

Rule 14.1(a) of this Court's rules requires a petitioner to identify the issues presented for review "expressed concisely in relation to the circumstances of the case." Questions 2 and 3 do not comply with this requirement. Rather than state the questions "in relation to the circumstances of the case," these questions are framed as abstract academic inquiries better suited for a law review article or a law school exam. *Cf. Rice*, 349 U.S. at 74 (the Court does not hear academic questions, no matter how interesting.); *see also Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) ("General propositions do not decide concrete cases.").[3]

The issues are also based on Petitioners' fundamental misunderstanding of the proper application of

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[3] This Court's rules require Petitioners to specify "the stage of the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised." Sup. Ct. R. 14.1(g)(1). Petitioners failed to comply with this rule, and given the vagueness of the second and third questions on which they seek review it is impossible to determine whether these issues were properly preserved in the courts below.

the *Penn Central* balancing process. The three "ad hoc, factual inquiries" identified in *Penn Central* are not a checklist. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring) (*Penn Central* factors should not be "mechanistically applied."). Rather, this Court specifically identified these factors as "relevant considerations," *i.e.* examples of the kind of questions that might be asked rather than an exhaustive list. *See Andrus v. Allard*, 444 U.S. 51, 65 (1979) ("There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate. Formulas and factors have been developed in a variety of settings. * * * Resolution of each case, however, ultimately calls as much for the exercise of judgment as for the application of logic.").

A review of the Petition in light of "the circumstances of [this] case" discloses that Petitioners searched in vain for something to criticize about the Montana court's analysis:

- Contrary to Petitioners' suggestion, the Montana Supreme Court did not limit its consideration of the character of the government action to "the degree of intrusion in property rights." Pet. 26. Rather, consistent with Petitioners' position here, the court's holding acknowledged that "I-143 places the economic burden of eliminating Game Farms in Montana squarely on the shoulders of individuals, like the appellants, who have entered into this industry in

reliance on the continued legality of fee-shooting." *Compare* P. App. 178 *with* Pet. 28 (agreeing that placement of the economic burden on the plaintiffs alone is a consideration "[that] should be included in any takings inquiry.").

- The court agreed with Petitioners that the "character of the government action" prong should not be applied to resurrect the means-end test rejected by this Court in *Lingle*. *Compare* Pet. 27-28 (arguing that "the effectiveness of a regulation in achieving an important governmental objective is outside the scope of deciding takings claims) *with* P. App. 57 ("[W]e disagree with the analysis employed by the District Court because it inquired into the purposes and propriety of I-143 in a manner foreclosed by *Lingle*. . . .").

- Petitioners' argument that "courts have developed widely differing views on what the 'character of the governmental action' inquiry actually involves," Pet. 29, has nothing whatsoever to do with this case. Petitioners have not shown that their views in this area differ from those of the Montana court. They cite four cases with respect to this assertion. Three of them – *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260 (Fed. Cir. 2009), *Cienega Gardens v. United States*, 503 F.3d 1266 (Fed. Cir. 2007), and *Tennessee Scrap Recyclers Ass'n v.*

Bredesen, 556 F.3d 442 (6th Cir. 2009) – relate to a proposition with which the Montana Supreme Court agreed, *viz.*, that the character of the governmental action prong cannot serve as back door revival of the means-end test discredited in *Lingle*.

The fourth case Petitioners cite, *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W. 2d 623, 639 (Minn. 2007), stands for another proposition with which the Montana court agreed – that the inquiry under this prong must include consideration of whether the regulation singles out a small group of persons to bear the burden of a regulation pursuing the public good. P. App. 178 (observing that "whatever the rationale for preventing fee-shooting, it is clear that individuals like appellants, and not the public as a whole, are being asked to bear the burden.").

If the lower courts are finding difficulty in applying the *Penn Central* factors consistently – a proposition that the Petition fails to demonstrate – one would think it would be easy to find rampant instances in which courts considering similar facts have reached differing conclusions on the ultimate issue of whether a taking occurred. Petitioners have made no such showing, and this case is certainly not an example of that problem. As discussed below, the decision in this case is consistent with decisions both of this Court and the Court of Appeals for the Federal

Circuit considering similar taking claims. The asserted difficulties in deciding which fact goes under which *Penn Central* factor may be fodder for academics and commentators, but this Court need not address them until they are presented in a case in which they are actually decisive. This is not that case.

C. A regulation that completely removes a commercial activity from the market place is not a price control.

Relying on cases that have nothing to do with this one, Petitioners assert that I-143 was enacted not to eliminate fee-shooting but rather to control its price. The *Kafka* Petitioners thought so little of this issue that they did not even raise it in the courts below, and the court below appropriately gave the argument short shrift.

The cases on which Petitioners rely afford no support for Petitioners' conclusion. All involve entities equivalent to a public utility that provide an important service in the public interest and in exchange are guaranteed a fair rate of return on its assets devoted to public purposes.[4] None involves a regulation

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[4] *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989) (electric utility); *In re Chicago, Milwaukee, St. Paul and Pacific R.*, 799 F.2d 317 (7th Cir. 1986) (railroad); *Covington & Lexington Turnpike Rd. Co. v. Sandford*, 164 U.S. 578 (1896) (private turnpike); *Stone v. Farmers' Loan and Trust Co.*, 116 U.S. 307 (1886) (railroad).

completely prohibiting a commercial activity under a State's police power.

Initiative 143 did not regulate the price of fee-shooting at zero any more than the Department of the Interior's regulation in *Andrus* banning commercial trafficking in eagle feathers regulated the price of feathers at zero, or Prohibition regulated the price of beer at zero, *James Everard's Breweries v. Day*, 265 U.S. 545 (1924). Respondents are aware of no case, and Petitioners have cited none, that supports Petitioners' claim that a valid police power regulation prohibiting a commercial activity should be viewed as a price control measure for purposes of the Takings Clause. This Court need not grant the writ to decide such an insubstantial question.

II. The Montana Supreme Court's Decisions Do Not Conflict With Relevant Decisions Of The Court Of Appeals For The Federal Circuit.

Petitioners argue that the Montana Supreme Court's decisions conflict with the decisions of the Court of Appeals for the Federal Circuit in two cases: *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260 (Fed. Cir. 2009), and *Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1990). In fact, two lines of authority exist in the law of the Federal Circuit, and the Montana court's decision is completely consistent with both of them.

A. *Yancey*

In *Yancey*, the Federal Circuit Court of Appeals affirmed a finding by the Court of Federal Claims that enforcement of a Department of Agriculture regulation caused an uncompensated taking. The regulation was designed to control the spread of avian influenza, a disease that was absent in Yancey's flock. The regulation nevertheless authorized a quarantine that applied to Yancey's flock, and provided a federal indemnity payment for the destruction of contaminated flocks. The Yanceys sold their turkeys for slaughter at a large loss, compared to their value as breeding stock. They were not entitled to the indemnity payment because their flocks were not infected. 915 F.2d at 1539.

On appeal, the circuit court found that the Yanceys' expectation of profit on their flock was reasonable because the Court of Federal Claims had before it unrebutted evidence that the application of the quarantine regulation to their birds was completely unexpected and therefore beyond the Yanceys' reasonable expectations. 915 F.2d at 1540. The trial court in this case reached the opposite conclusion, holding that Petitioners should reasonably have expected that the States' regulation might end the practice of fee-shooting and thereby destroy their business. The Montana Supreme Court deferred to the trial court's finding, just as the Federal Circuit Court of Appeals deferred to the contrary conclusion in *Yancey*.

B. Other Federal Circuit cases

There is also a line of decisions in the Federal Circuit that distinguish cases such as *Yancey*. This line holds, whether as a matter of the identification of a property interest or as a matter of a claimant's reasonable expectations, that a taking does not occur when a government regulation ends a profitable use of property that the claimant could not reasonably have expected to continue indefinitely.

- In *Allied-General Nuclear Services v. United States*, 839 F.2d 1572 (Fed. Cir.), *cert. denied*, 488 U.S. 819 (1988), the court found no taking where the plaintiff had expended more than $200,000,000 in construction of a uranium reprocessing plant that was rendered completely worthless by the Government's adoption of an indefinite moratorium on the processing of the uranium in spent fuel rods from nuclear power plants. Consistently with the court below in this case, the court of appeals principally relied on the fact that Allied-General knew that the government's policy regarding the processing of the spent fuel rods might change and render its investment worthless. 839 F.2d at 1577.

- In *Huntleigh USA v. United States*, 525 F.3d 1370, 1383-84 (Fed. Cir.), *cert. denied*, 129 S. Ct. 626 (2008), the court held that no taking occurred when the government terminated Huntleigh's contract for provision of airline security checks and took over airline security through the TSA, based on the factual finding that Huntleigh's contract did not guarantee it exclusive right to provide the service.

- In *Members of the Peanut Quota Holders Ass'n v. United States*, 421 F.3d 1323, 1334-35 (Fed. Cir. 2005), *cert. denied*, 548 U.S. 904 (2006), the court held no taking had occurred when the government changed its method of allocating peanut quotas to exclude entities, like the Association's members, that did not actually produce peanuts. The court based its holding on the observation that a government agency cannot be charged with a taking when it withdraws a business opportunity that the agency itself had created.[5]

- In *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1382-83 (Fed. Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005), the court found no taking where the government withdrew the claimant's privilege to use its hyper-efficient trawlers to fish in a zone of its sovereign waters where the trawlers were depleting the supply of fish. The coastal waters were subject to the plenary regulatory authority of the government, which retained the authority to grant or revoke the privilege to take fish.

- In *Mitchell Arms v. United States*, 7 F.3d 212, 216-17 (Fed. Cir.), *cert. denied*, 511 U.S. 1106 (1993), the court held that no taking had occurred when the government granted the

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[5] This case is especially apt here. The privilege of owning wild animal species for commercial exploitation did not exist at common law. *Rosenfeld v. Jakways*, 67 Mont. 558, 216 P. 776 (1923). Game farming is an activity that exists only because the Montana legislature chooses to permit it.

claimant a license to import firearms and then chose to ban the importation of the guns. The court held that the license did not create a permanent expectation that Mitchell would be allowed to import foreign arms because the license was issued against the backdrop of the regulation of gun imports under the federal Gun Control Act.

- In *Conti v. United States*, 291 F.3d 1334, 1341-42 and n.5 (Fed. Cir. 2002), *cert. denied*, 537 U.S. 1112 (2003), the court held that enactment of a regulation prohibiting the capture of swordfish by gill net was not a taking because the claimant did not have a property interest in the government's decision whether to allow the practice of gill netting to continue indefinitely.

The Montana court properly placed its reliance on this line of cases rather than *Yancey*.

C. *Rose Acre Farms*

The Federal Circuit's 2009 decision in *Rose Acre Farms* marked the third time the case had made it to the court of appeals. Each time the Court of Federal Claims had found a taking, and in each case the appeals court had reversed. In the 2009 appeal, the court did not evaluate the question of Rose Acre's investment-backed expectations. Rather, it relied on its holding in a previous appeal that the particular regulatory framework regarding control of salmonella in chickens gave Rose Acre no reason to expect that its flock might be destroyed. As noted above with

respect to *Yancey*, the opposite is true with respect to regulation of Petitioners' game farms.

D. The asserted conflict is illusory.

None of the Federal Circuit court's decisions is in clear conflict with the decision of the Montana Court here.[6] *Yancey* and *Rose Acre Farms* arose from regulatory histories completely different from those presented here. The courts there found that the claimants had no reason to expect that their property would be devalued by new government regulations. The facts in this case are to the contrary.

Where, as here, a court has found as fact that the plaintiff lacked a subjective expectation that its business activity would exist in perpetuity free of government regulations impairing its profitability, the courts are unanimous in holding that the investment-backed expectations prong of the *Penn Central* test cuts against a taking. There is no conflict requiring this Court's intervention.

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[6] The circuit court's decisions in *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003) and *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990), cited in footnote 5 of the Petition, also present no conflict. In *Cienega*, the trial court made specific factual findings supporting a conclusion that the plaintiffs did not in fact have reason to expect the regulatory change that worked to their detriment. 331 F.3d at 1353. In *United Nuclear*, the Court found a taking because the government adopted its regulation specifically to allow an Indian Tribe to extract additional revenue from United, a factual circumstance not remotely similar to the one presented here.

III. The Montana Court's Decision Here Is Consistent With This Court's Precedent.

This Court has held repeatedly that the government may adopt a business regulation that impairs, or even destroys, the value of the inventory of a regulated business without being responsible for payment of compensation under the Takings Clause. In *Allard*, a case on which the Montana court heavily relied, the government adopted a regulation banning the sale of Allard's inventory of feathers from a protected species of eagle. This Court unanimously found no taking and explained its reasoning in terms that suit this case well:

> At any rate, loss of future profits – unaccompanied by any physical property restriction – provides a slender reed upon which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.

444 U.S. at 66. Based on this analysis the Court concluded that "the simple prohibition on the sale of lawfully acquired property in this case does not effect a taking. . . ." *Id.* at 67-68.

In *Lucas*, the Court considered a case involving the elimination of all economically viable use of land to construct a house. The Court analyzed the matter

by reference to the effect the regulation had on the full bundle of rights that existed in the property under common law. The right to make economic use of land for construction of a dwelling was unquestionably within the permissible uses of the land at common law. The Court expressly distinguished cases like the one at bar, stating:

> [I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale).

505 U.S. at 1027.

Both *Allard* and *Lucas* rely on the Court's earlier decision in *Mugler v. Kansas*, 123 U.S. 623 (1887), which upheld a Kansas statute banning the sale of beer. In *Allard*, the Court quoted *Mugler* for the observation that "[r]egulations that bar trade in certain goods have been upheld against claims of unconstitutional taking." 444 U.S. at 67. *Lucas* cites *Mugler* twice without intimating that the case has lost precedential force. 505 U.S. at 1026 n. 13, 1027 n.14. In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 (1987), the Court quoted *Mugler* with approval for the proposition that "prohibition on use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in

any just sense, be deemed a taking or an appropriation of property." Justice Thomas, dissenting from this Court's decision in *Kelo v. City of New London*, 545 U.S. 469, 519 (2005), cited *Mugler* favorably for the rule that "[t]raditional uses of [the police power], such as the power to abate a nuisance, required no compensation whatsoever."

The Montana Supreme Court placed significant reliance on the cases discussed, and was faithful to their teachings. Petitioners do not urge the Court to overrule or distinguish them. In fact, the Petition does not cite them at all.

Petitioners do urge the Court to rely on *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949). That case involved a physical occupation of Kimball's laundry business, not a claimed regulatory taking. This Court has cautioned that physical taking principles should not be imported into a regulatory taking analysis, *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 323-24 (2002), and the Montana courts therefore properly distinguished *Kimball Laundry*. P. App. 158-60.

The Petition does not argue that the Montana courts erred in relying on this Court's precedents, nor do they ask the Court to reconsider the decisions. The Court should not grant a petition challenging a decision that faithfully follows this Court's precedents.

CONCLUSION

"Government could not go on if to some extent values incident to property could not be diminished without paying for every such change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). Petitioners would have the Court hold that if a government regulation's negative effect on a business is drastic enough, nothing else matters and compensation must be paid. The Montana courts rejected that view in favor of the kind of careful analysis required by *Penn Central*. For the foregoing reasons, the Court should deny the Petition.

Respectfully submitted,

STEVE BULLOCK
Attorney General of Montana
CHRIS D. TWEETEN
Chief Civil Counsel
Counsel of Record
STATE OF MONTANA
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

Montana Statutes

87-4-407. License required – moratorium – penalty – seizure of illegally possessed animals. (1) A person may not operate an alternative livestock ranch in this state without having first obtained an alternative livestock ranch license from the department prior to November 7, 2000. A person may not apply for or be granted a license after that date.

(2) A person who operates an alternative livestock ranch without a license or possesses, transports, buys, or sells animals whose importation into the state is restricted pursuant to 87-4-424 is guilty of a misdemeanor and is subject to the penalties provided in 87-4-427(4).

(3) Any animal held in violation of subsection (2) or otherwise illegally possessed may be immediately seized by the department and is subject to disposal by the department. Costs of seizure may be charged to the person in possession of the animal.

87-4-412. Term of license – renewal – transfer prohibited. (1) An alternative livestock ranch license expires on March 1 of the year succeeding the year of issuance. Application for renewal must be made before a license expires. The department shall renew the license upon payment of the renewal fee if the licensee has complied with all recording and reporting requirements.

(2) An alternative livestock ranch license for a specific facility is not transferable.

87-4-413. Inspection. The department may inspect the alternative livestock ranch or the licensee's alternative livestock ranch records on a scheduled basis or on another reasonable basis as may be determined necessary.

87-4-414. Alternative livestock as private property – source – marking – fee shooting prohibited. (1) All alternative livestock lawfully possessed on a licensed alternative livestock ranch are private property for which the licensee is responsible as provided by law.

(2) The licensee may acquire, breed, grow, keep, pursue, handle, harvest, use, sell, or dispose of the alternative livestock and their progeny in any quantity and at any time of year as long as the licensee complies with the requirements of this part, except that the licensee may not allow the shooting of game animals or alternative livestock, as defined in 87-2-101 or 87-4-406, or of any exotic big game species for a fee or other remuneration on an alternative livestock facility.

(3) A licensee shall mark alternative livestock in a manner approved by the department of livestock, as required under subsection (4), and that indicates ownership and provides individual identification of

animals for inspection, transportation, reporting, and taxation purposes.

(4) The department of livestock is responsible for the control, tracking, and distribution of identification tags used for the marking of alternative livestock. The department of livestock shall require that all imported alternative livestock are marked within 30 days of importation and that all other alternative livestock are marked prior to January 1 of each year. Each alternative livestock must be marked with identification that:

(a) is unique to the animal;

(b) is nontransferable;

(c) has an emblem owned and registered by the department of livestock that is embossed on each identification tag; and

(d) allows for the identification of alternative livestock from a distance.

(5) Upon the request of a licensee, the department of livestock may grant a temporary waiver as to the time for identification and to the manner of identification if necessary to address a special circumstance.

(6) Alternative livestock must be lawfully acquired by the licensee. Alternative livestock may be kept only on a licensed alternative livestock ranch. A licensee who keeps alternative livestock owned by, leased to, or leased from another person shall comply

with all of the requirements of this part as if the animal belonged to the licensee. Records and reports submitted by the licensee pursuant to 87-4-417 must identify any alternative livestock kept by the licensee during the reporting period and the name and address of the owner or lessee.

(7) Except as otherwise provided in this part, laws applicable to game animals do not apply to alternative livestock raised on a licensed alternative livestock ranch.

87-4-415. Transportation, sale, and disposal of alternative livestock – quarantine. (1) Prior to selling, transferring, transporting, or disposing of one or more alternative livestock, the alternative livestock ranch licensee shall request an inspection of the alternative livestock, which inspection must be completed by a department of livestock designated agent. All dead alternative livestock must be reported to the department of livestock within 1 working day of the discovery of the death.

(2)(a) Inspection under subsection (1) must be conducted pursuant to 81-3-203(1) through (3) and must include the number, species, age, sex, and individual identification numbers of alternative livestock transported or disposed of.

(b) A copy of the certificate of inspection must be provided by the department of livestock to the department within 10 days of inspection.

(3) The department of livestock may quarantine or issue a hold order on any alternative livestock pending inspection and health certification. The department shall notify the department of livestock regarding the importation or transportation of any alternative livestock that the department reasonably believes may be infected with a disease specific to wildlife.

87-4-416. Sale of carcass and meat – regenerative parts excluded. (1) An alternative livestock ranch licensee may sell or otherwise dispose of the carcass of properly identified alternative livestock taken from an alternative livestock ranch in accordance with the provisions of 87-4-415. A copy of the certificate of inspection must be attached to the carcass or container. Upon the attaching of the certificate of inspection, the carcass of the alternative livestock may be transported within the state to the transferee named on the certificate of inspection.

(2) The licensee may sell alternative livestock for meat upon compliance with all applicable health laws.

(3) The sale of regenerative parts that may be harvested is specifically excluded from the requirements of this section.

87-4-417. Records and reporting – rules. (1) Each alternative livestock ranch licensee shall keep and maintain for 3 years accurate written records of all alternative livestock purchases, transfers, sales, births, and deaths, on forms provided by the department, showing:

(a) the number of each species of alternative livestock purchased by the alternative livestock ranch licensee and from whom purchased;

(b) the number of each species of alternative livestock transferred or sold, the date of transfer or sale, and the name and address of the person to whom the transfer or sale was made; and

(c) individual identification of each alternative livestock that was purchased, transferred, sold, or born or that died. However, a calf or fawn that dies prior to being marked pursuant to 87-4-414(4) need not be identified.

(2) Unless a different reporting frequency has been established pursuant to subsection (3), within 2 weeks after January 1 and July 1 of each year, the alternative livestock ranch licensee shall file a report with the department, showing the number and species of alternative livestock that were on hand as of January 1 and July 1 and the number and species of alternative livestock that escaped, that were bought, sold, transferred, recaptured, or born, or that died during the reporting period.

(3) The department may establish by rule the conditions under which the frequency of reporting requirements may be reduced to one report a year or increased to three reports a year. The department may establish by rule the conditions under which a licensee may submit an abbreviated report. In adopting those rules, the department shall consider the number of animals present on an alternative livestock ranch, the number of reported transactions during previous reporting periods, a history of accurate recordkeeping, and a historical absence of violations.

87-4-433. Programmatic environmental review. (1) The department, in cooperation with the department of livestock, shall, by July 1, 2001, conduct a programmatic review of environmental impacts that may be associated with the granting of a license to operate an alternative livestock ranch.

(2) In consultation with the department of livestock, the department shall select a contractor to prepare the programmatic environmental review, which must be in the form of an environmental impact statement.

(3) In addition to the department of livestock, the department shall seek the assistance and participation of other governmental agencies that have special expertise in areas that should be addressed in the programmatic.

Montana Administrative Rules

12.6.1522 LICENSE APPLICATION AND DEPARTMENT APPROVAL

(1) Applicants for a game farm license shall file with the department and the Department of Livestock a written application on a form prescribed by the department. The applicant shall include the initial license fee with the application.

(2) The application must include the following minimum requirements:

(a) a written description setting forth the township, range, and section, or portion of section, and estimated acreage of the game farm;

(b) a 72 minute topographical map identifying the location of the game farm;

(c) a detailed drawing or map of the game farm showing the location of the exterior fence, all exterior gates, catch pens and quarantine facilities;

(d) a written description of specifications for all exterior fencing, including portions of quarantine and other internal facilities that serve as exterior fencing;

(e) documentation showing compliance with the application requirements for catch pens, handling devices and quarantine facilities in Department of Livestock rule ARM 32.4.801;

(f) the species and peak numbers of game farm animals that will occupy the game farm;

* * *

(h) information showing the applicant's capacity to conduct regular inspections and to detect and respond on a timely basis to occurrences of ingress and egress.

(3) If the applicant anticipates expansions, increases in animal numbers or other modifications in the future, the applicant may request at the time of initial application that the department conduct a comprehensive environmental review pursuant to ARM 12.6.1525 on all phases of the proposed project. The applicant's request must specify the elements of each future phase, including for each phase the proposed exterior fence locations, peak numbers and species of animals that will occupy the game farm.

(4) The department may not approve an application for a game farm that is in other than a single location. A game farm may be considered as a single location if the parcels of property comprising the game farm are contiguous and under the same ownership or secured lease. Contiguous property may include parcels separated by a public or private road or a river or stream, or adjacent property under the same ownership or lease.

(5) The applicant shall complete the construction of the proposed game farm facilities within three years after the department approves the application. If the applicant fails to complete construction or obtain an extension within such period, the applicant must file a new application. If the department conducted a comprehensive environmental review on a

phased development pursuant to (3), the applicant shall complete the construction for the phase or phases for which the applicant has requested and received approval within three years after the department's approval. To proceed with any additional phases, the licensee shall apply and receive approval for a license modification and shall complete any construction associated with such additional phases within three years after the department's approvals. The applicant may request extensions of the three year construction periods pursuant to ARM 12.6.1544.

12.6.1525 ENVIRONMENTAL REVIEWS

(1) The department will perform an environmental review under the Montana Environmental Policy Act (MEPA) on all applications for game farm licenses. The review will consider the peak number of animals identified in the application. The department may also perform a review of cumulative phases identified in an application.

(2) The department or its representatives shall discuss with the applicant the environmental impacts of the proposed action and potential mitigation measures or stipulations identified in the department's initial review prior to the issuance of a draft environmental assessment (EA) or environmental impact statement (EIS).

(3) The department may conduct a supplemental environmental review of a game farm operation, including modifications to licenses, under any of the following conditions:

(a) there are substantial changes in the proposed action that are relevant to environmental concerns; or

(b) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(4) A supplemental environmental review must include, but is not limited to, a description of the following:

(a) an explanation of the need for the supplement;

(b) the proposed action; and

(c) any impacts, alternatives or other items required by ARM 12.2.432 for an EA, by ARM 12.2.436 for a draft EIS, or by ARM 12.2.438 for a final EIS that were either not covered in the original environmental review or that must be revised based on new information or circumstances concerning the proposed license modification.

(5) The renewal or transfer of a license pursuant to 87-4-412, MCA, is a ministerial action under the provisions of ARM 12.2.430(5)(e) and is not subject to an environmental review.

12.6.1533 MINIMUM FENCE STANDARDS FOR APPLICATIONS FILED BETWEEN MAY 15, 1992, AND JANUARY 15, 1999, FOR FACILITIES HOLDING CLOVEN-HOOFED UNGULATES

(1) The following requirements for fence height, posts and gates shall apply to applications filed between May 15, 1992, and January 15, 1999, for game farms holding cloven-hoofed ungulates. If the facilities are not in compliance with this rule or are not otherwise game proof, they will be subject to the requirements in ARM 12.6.1531. Reconstruction of such facilities must satisfy the minimum standards in ARM 12.6.1531, any additional requirements in the license and any further requirements to ensure that the fences are game proof.

(2) Conventional perimeter fences must be, at a minimum, 8 feet above ground level for their entire length. The bottom 6 feet must be mesh of sufficient size to prevent wild animals from entering and game farm animals from escaping. Supplemental wire required to attain a height of 8 feet may be smooth, barbed, or woven wire (at least 122 gauge) with strands spaced not more than 6 inches apart.

(3) Perimeter fences constructed of high tensile wire must be supported by a post or a stay at minimum intervals of 8 feet.

(4) Conventional perimeter fences must be at least 122 gauge woven wire, 142 gauge high-tensile woven wire, chain link, non-climbable woven fence, or

other fence approved by the Department of Fish, Wildlife, and Parks.

(a) if the wire used is not a full 8 feet in height, it must be overlapped one row and securely fastened at every other vertical row or woven together with cable.

(5) Electric fencing materials may be used on perimeter fences only as a supplement to conventional fencing materials.

* * *

12.6.1538 EGRESS AND INGRESS

(1) The department or any peace officer may seize, capture, or destroy escaped game farm animals pursuant to the terms of this rule.

(2) The licensee shall report to the department and the Department of Livestock all escapes of game farm animals and all ingress of game animals (including all ingress of mountain lions and bears) and the reasons for such escapes and ingress. The licensee shall report each escape and ingress immediately by telephone to the department and the Department of Livestock and shall file a written report with both departments within 10 days of discovery or notice of the escape or ingress. The licensee shall submit the written reports on forms provided by the department and completed and signed by the licensee. Ingress of animals other than game animals requires no notification.

* * *

(4) The licensee shall notify the department and the Department of Livestock immediately of the recapture or death of an escaped animal and, upon the request of either department, shall hold the animal for inspection before returning it to the game farm.

* * *

12.6.1539 GAME FARM RECORDS AND REPORTS

(1) The licensee shall maintain records, including records and reports prepared on forms provided by the department and the Department of Livestock, inspection certificates, receipts, invoices, agreements of sale, canceled checks, and bills of sale, in accordance with 87-4-417, MCA. The licensee shall keep such records on or near the premises of the game farm and shall make the records kept on forms provided by the department and the Department of Livestock available for inspection upon the department's request. The licensee shall declare in the license application the location of the licensee's game farm records and reports and shall notify the department of any changes in their location.

(2) The licensee shall prepare and submit reports on forms provided by the department, unless the department has given written authorization for a different format.

(3) Records and reports must include purchases, sales, escapes, recaptures, boarding, leasing, transfers,

slaughters, deaths and births of game farm animals and the sex, animal identification numbers, species (including the identification of hybrids) and ownership of each game farm animal. The licensee shall record purchases, sales, boarding, leasing, transfers and slaughters within 10 days of their occurrence.

* * *

(5) The licensee shall file the reports prepared pursuant to this rule with the department within 2 weeks of the reporting periods ending December 31 and June 30 of each year.

* * *

(7) The department may require the licensee to perform a game farm animal census when there are discrepancies in game farm records or reports. The licensee may request the presence of both the department and the Department of Livestock.

(8) Upon the termination, revocation, or surrender (including the failure to renew) of a license, the licensee shall, within 10 days of the removal of the game farm animals, submit a final report, including records and reports prepared on forms provided by the department and the Department of Livestock, showing the disposition of the animals.

12.6.1542 ELK-RED DEER HYBRIDIZATION

(1) Licensees shall test all elk born on or prior to December 31, 1999, for elk-red deer hybridization by January 1, 2000.

(2) Licensees shall test all elk born between January 1, 2000, and December 31, 2001, for elk-red deer hybridization by January 1 of the year following the year of birth or when the animal is sold or transported from the game farm, whichever comes first. Game farms that provide documentation to the department verifying that all game farm elk on the facility have been hybrid tested prior to January 1, 1999, may apply for a waiver of the requirement to test offspring born in 2001 to be granted a waiver by the department, a game farm must:

* * *

(4) Licensees shall provide for the submission of all test results to the Department of Livestock and all positive test results to the department.

* * *

32.4.201 IDENTIFICATION OF GAME FARM ANIMALS WITH THE EXCLUSION OF OMNIVORES AND CARNIVORES

(1) Game farm animals owned or transferred to any game farm within the state of Montana must be individually identified by the method prescribed by the department.

(2) Every game farm animal must be marked with a whole herd mark (herd tattoo) registered to the game farm animal owner and placed in the location on the animal identified by the department's recorder of marks and brands.

* * *

(3) Under the authority of 87-4-414, MCA, each game farm animal will be marked with a Montana official ear tag issued by the department.

* * *

32.4.301 INSPECTION OF GAME FARM ANIMALS

(1) Prior to the sale, transfer of ownership, or transportation of a live animal from a licensed game farm, with the exclusion of omnivores and carnivores, the animal must be inspected by the department designated agent with the following exceptions:

* * *

(2) For animals that are killed by predators or die of natural causes, the animal death must be reported to the department (Helena office) within 1 working day of the discovery of death.

* * *

(3) Game farm animals that are marketed for hunting purposes or an animal slaughtered on the game farm must be inspected by a department designated agent.

* * *

(4) A valid bill of sale must accompany any sale, or transfer of ownership of any game farm animal, carcass, meat or parts.

* * *

32.4.401 CHANGE OF OWNERSHIP TESTING REQUIREMENTS FOR GAME FARM ANIMALS

(1) Prior to a change of ownership, movement, transfer, or sale of game farm animals within Montana, the animals must meet all testing requirements mandated by the state veterinarian under ARM Title 32, chapter 3, subchapters 4 and 6.

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32.4.502 IMPORTATION OF RESTRICTED OR PROHIBITED GAME FARM ANIMALS

(1) The department has designated the following game farm animals as "restricted species" on the basis of specific animal health risks that they pose to wildlife and/or domestic livestock:

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(c) Wild or captive elk, mule deer and whitetail deer may not be imported or transported from a geographic area or game farm where chronic wasting disease is endemic or has been diagnosed unless they meet all importation requirements, transportation requirements and any other requirements mandated

by statute, rule or order of the state veterinarian under the authority of Title 81, chapter 2, MCA.

32.4.1302 REQUIREMENTS FOR MANDATORY SURVEILLANCE OF MONTANA GAME FARM CERVIDAE FOR CHRONIC WASTING DISEASE

(1) The licensee must present his entire herd annually for inspection by a designated agent of the department. The department will verify each game farm animal's identification and the game farm animal inventory must reconcile with the department's records.

(2) The licensee must report all game farm animal deaths to the department (Helena office) within 1 day of the discovery of death as required by 87-4-415, MCA.

(3) Upon the discovery of dead cervids, the licensee must immediately request an inspection of the game farm animal as required by ARM 32.4.307. At the time of the inspection of the dead animal, the alternative livestock veterinarian shall remove the currently required tissue samples and/or specimens and submit them to a department approved laboratory for testing for chronic wasting disease (CWD).

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(5) Any person having knowledge that a game farm cervid has been diagnosed as affected with CWD

or exposed to CWD must report that knowledge to the department as required by ARM 32.4.1001.